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Supreme Court of the United States

October Term, 1999

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; J. EDWARD MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNETT; ROBERT M. JOHNSON; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; ENA L. FARLEY; GERALDINE CHAPEY; RICARDO OQUENDO; ELEANOR BARTLETT; and ARNOLD GARDNER, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; CHARLES GARGANO as Director of the Urban Development Corporation; GEORGE E. PATAKI, as Governor of the State of New York; and H. CARL McCALL, as Comptroller of the State of New York,

Petitioners,

(Caption continued on inside of cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 14, 2000

39 pp

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

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QUESTIONS PRESENTED

1. Whether, and under what circumstances, state officials can be liable under the Fourteenth Amendment and 42 U.S.C. § 1983 for not taking remedial steps to combat local school segregation where the courts found that state officials in no way participated in or condoned the local discriminatory acts that the courts found to have caused the segregation.

2. Where there are explicit findings that the Yonkers schools are desegregated with respect to the *Green* factors and there is no finding that vestiges of the prior segregation remain in the public school system, whether the federal courts may impose liability, unlimited in duration, against state officials for the ongoing costs of a prior desegregation remedy imposed against local municipal and school district defendants.

3. Whether Congress made clear its intent to abrogate the States' Eleventh Amendment immunity in the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. § 170l, *et seq.*

4. Whether Congress intended the EEOA to impose upon the States supervisory responsibility over local educational agencies, and liability based on the failure to exercise such supervisory responsibility.

LIST OF PARTIES

All parties in the court below are listed in the caption to this petition, with parties sued only in their official capacities substituted, where appropriate, pursuant to Rule 35.3 of the Rules of this Court.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

THE STATE OF NEW YORK, et al.,

Petitioners,

-v.-

YONKERS BOARD OF EDUCATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of New York, on behalf of the State and the named state officials and entities, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 16, 1999, and a decision of that same court entered on September 23, 1996.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit are reported at 197 F.3d 41 (2d Cir. 1999) and 96 F.3d 600 (2d Cir. 1996), and are reproduced in the appendix at 1a and 66a. The underlying opinions of the United States District Court for the Southern District of New York are reported at 984 F. Supp. 2d 687 (S.D.N.Y. 1997), 880 F. Supp. 212 (S.D.N.Y. 1995) and 888 F. Supp. 591 (S.D.N.Y. 1995), and are reproduced in the appendix at 36a, 123a, and 185a, respectively. The order and judgment of the district court dated February 10, 1998, is reproduced in the appendix at 33a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit, finally ordering the state defendants to pay one-half of the costs of the Yonkers school desegregation remedy for the 1996-1997 school year, was entered on November 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision relevant to this action is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, reprinted at 356a. The relevant statutory provisions are 42 U.S.C. § 1983 and the Equal Educational Opportunities Act, 20 U.S.C. §§ 1703, 1706 and 1720, reprinted at 356a -358a.

STATEMENT OF THE CASE

The Yonkers school district, located just north of New York City on the east side of the Hudson River, has a student population of 24,000. In 1986, following six years of litigation, the district court held that Yonkers city officials and the Yonkers Board of Education had undertaken a series of intentionally discriminatory actions over a 45-year period, and ordered them to implement a desegregation plan that continues in effect today. In late 1997, nearly eighteen years after the litigation commenced and twelve years after implementation of the remedial plan by the City and the Board began, the district court ordered the state defendants to bear half of the ongoing costs of the previously ordered desegregation plan, as well as the costs of an expansive new remedial plan which the court ordered to eliminate the vestiges of segregation. The Second Circuit vacated the findings of vestiges and the new remedial plan and remanded to the district court to determine whether vestiges not previously identified by the district court persist in the Yonkers schools to support the imposition of further desegregation measures. The Second Circuit, however, affirmed the district court's order requiring the state defendants to pay half of the ongoing costs of the initial remedial plan entered in 1986 against the City and the Board. This final imposition of liability against the state defendants for the initial desegregation plan, which will run in the hundreds of millions of dollars, is in direct contravention of this Court's precedents and poses important consequences for the State of New York and for other states.

A.

The United States commenced this action in 1980 against the City of Yonkers ("the City"), the Yonkers Board of Education ("the Yonkers Board") and the Yonkers Community Development Agency. At that time, none of the present state defendants, petitioners herein, was named as a party. Seeking the

district court's remedial intervention, the complaint alleged, among other things, that the Yonkers public schools were racially segregated. Shortly after the action was commenced, the Yonkers Branch of the National Association for the Advancement of Colored People ("NAACP") obtained permission to intervene as a plaintiff.

Following several years of discovery and a lengthy trial, the district court concluded, *inter alia*, that the racial segregation of the Yonkers public schools was the result of intentional discrimination by the City and the Yonkers Board. *See United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1388-1545 (S.D.N.Y. 1985). This conclusion was based on a history of segregative housing actions by the City, *id.* at 1294-1376, combined with the relationship between the City's housing practices and the Yonkers Board's neighborhood school policy. *Id.* at 1500-1503. The court analyzed a multitude of individual actions taken by the Board and City officials over a forty-five year period to arrive at its finding of intentional segregation. *Id.* at 1388-1500. None of the segregative actions examined by the district court was found to have been taken as a result of state policy or at the suggestion of a state agency or official. *Id.* at 1388-1545.

In May 1986, the district court issued an order against the City and the Yonkers Board requiring immediate implementation of a desegregation plan, now known as EIP I, calling for various school closings, an extensive system of magnet schools, voluntary busing, and student and staff reassignment. *See United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986). The Second Circuit affirmed the district court in all respects. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

The Yonkers Board commenced implementation of the order and, as the district court later observed, "the racial separation of

students in the Yonkers public schools, which ha[d] existed for decades, ended.... Within a year of the issuance of EIP I, the Yonkers Board achieved desegregation of enrollments among the schools" (207a-208a). Since 1986, the district court has continued to oversee the implementation and expansion of the system-wide EIP I program, which now costs the school district nearly $85 million annually over and above its basic educational costs.

B.

The State of New York, its Governor, the Board of Regents and its members, the State Education Department and the Commissioner of Education became involved in this matter for the first time on September 17, 1987 -- seven years after the litigation began and one year after the district court issued its remedial order. At that time, the Yonkers Board moved for leave to amend its answer to assert a cross-claim against the state parties. A week later, the NAACP moved for leave to file a second amended complaint to assert a claim against the state parties. The United States opposed the motions, which were nonetheless granted on January 19, 1989.[1]

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[1] The Yonkers Board and NAACP also added the Urban Development Corporation of the State of New York ("UDC") and its director, based on claims that by building approximately 1800 units of subsidized housing in southwest Yonkers prior to 1975, the UDC had "exacerbated" residential and school segregation in Yonkers (296a, 310a-311a). The parties have not sought, and the courts below have not imposed, specific educational relief against the UDC defendants. All housing claims against the UDC defendants were settled by order of the district court dated December 1, 1998. Because the actions of UDC cannot be imputed to the State, *see United States v. Yonkers*, No. 92-6198, slip opn at 3, 990 F.2d 623 (2d Cir. Jan. 13, 1993) (holding UDC and its director not shielded by Eleventh Amendment immunity because UDC is an entity separate and apart from the State), the legal conclusions and factual findings relative to UDC are not discussed herein unless otherwise relevant.

The amended pleadings alleged that various actions and inaction of the State and its educational entities and officials had a "chilling effect" (293a) and a "negative impact" (296a) on the initiation by Yonkers of unspecified projects and plans for racial integration. The amended pleadings alleged claims arising under the Equal Protection Clause of the Fourteenth Amendment and related implementing statutes. Jurisdiction was asserted under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202 (286a, 303a). The cross-claimants and plaintiffs sought relief directing the state parties "to help implement and fund a plan ... to eradicate the effects of segregation" and to "participate" in the existing desegregation plan (299a). The state parties sought unsuccessfully to have the complaint against them dismissed for failure to state a claim upon which relief could be granted and on Eleventh Amendment grounds.

In 1993, the district court held the first of three trials involving the state defendants. The first trial addressed the question of whether there were "vestiges" of past segregation still extant in the Yonkers school district. The court reasoned that if there were no vestiges, no additional desegregation relief would be required and the state parties would be entitled to dismissal of all claims against them for that reason. The court did not explicitly distinguish between the claims for the State's financial participation in the ongoing EIP I, the remedial plan previously ordered against the City and Yonkers Board, and the claims seeking a further desegregation remedy to eliminate the vestiges of segregation.

After a three-week trial, the court issued an opinion finding that two vestiges of past segregation remained, specifically (i) low teacher expectations for minority students and (ii) insufficient use of multicultural teaching techniques and curriculum (221a). *See United States v. City of Yonkers*, 833 F. Supp. 214, 222 (S.D.N.Y. 1993). The court found principal support for its findings in evidence of racial disparities in student

achievement test results (216a-220a, 230a-245a). *Id.* at 220-222, 226-236.

The district court held a second, six-week trial in 1994 on the question of whether the state parties are liable and should be required to participate in any remedial plan to eliminate the vestiges of *de jure* segregation of the Yonkers schools. The parties established at that trial that New York State has prohibited *de jure* segregation since 1900, *see* 1900 N.Y. Laws, c. 492, codified at N.Y. Educ. Law § 3201(1) (McKinney 1995), and that as a matter of policy, the Board of Regents had long sought the elimination of all school segregation, without regard to whether it was *de jure* or *de facto*. *See* 1960 Regents Statement on Intercultural Relations in Education (Trial Exh. 3-1; 333a) and 1975 Regents Statement on Racial Integration of Schools (Trial Exh. 3-15; 336a). Trial proof also showed that, during the period in question, the State Education Department assisted local school districts in eliminating segregation by, among other things, providing technical assistance and support. *See, e.g.*, Report on the Education Department's School Desegregation Efforts Over the Past Three Years - January 1981 (Trial Exh. 14-58; 339a). The State Education Department also assisted those who wished to petition under New York Education Law § 310 for review of any school district's actions or inaction with respect to desegregation.[2] The evidence

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[2] New York's Education Law § 310, which authorizes anyone "aggrieved" by any action of a school district to file a § 310 petition with the Commissioner of Education to challenge such action, also empowers the Commissioner to initiate such proceedings. The trial testimony established that although there are about 250 proceedings under § 310 annually--covering, in addition to racial balance issues, such diverse subject areas as grading policies, special education, tenure rights, and pensions (Tr. 1393-94)--only one such proceeding during the period between 1968 and 1987 was initiated by the Commissioner himself. In that one situation, there was no aggrieved party within the district who could file a § 310 petition (Tr. 2186, 2203).

established that, between 1968 and 1987, at least 48 decisions concerning desegregation were issued under § 310, and in each, the State Education Department ordered implementation of desegregation plans (Trial Exhs. C-1 -- C-48).[3]

Additional proof adduced at trial showed that although no one filed a § 310 petition complaining of school segregation in Yonkers and the State Commissioner of Education did not *sua sponte* initiate such a proceeding, the State Education Department sought to encourage and assist Yonkers to achieve desegregation. These efforts were largely spurned by local authorities. *See, e.g.*, 624 F. Supp. at 1469 (despite grant provided to Yonkers from the State Racial Balance Fund, efforts to develop desegregation proposals were discontinued due to district superintendent's reluctance to pursue such proposals). The efforts were also severely hampered by the curtailment of state funding for the State Education Department as a whole in the wake of the economic collapse of New York City in the mid-1970s (Trial Exhs. FF-7, FF-9; Tr. at 161, 244). Ultimately, when the "carrot" proved unavailing, the Department tried the "stick" by withholding for the entire 1983-1984 school year state magnet funds that had been appropriated by the Legislature for Yonkers (Trial Exhs. FFF, GGG). Similar action was taken for the 1984-1985 school year (Trial Exhs. DDDDD, EEEEE), the last year for which proof was taken.

After trial, the district court made the following findings of fact, which were not disturbed by the Second Circuit (142a):

- There is no evidence that State education officials undertook affirmative actions to preserve segregation in the Yonkers schools, or that they indicated to anyone in Yonkers, either

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[3] *See, e.g., In the Matter of the Appeal of Burbank Mitchell*, 18 Ed. Dept. Rep. 9761 (1978) (Trial Exh. C-21); *In the Matter of the Appeal of Cleola Mae Sylvers*, 15 Ed. Dept. Rep. 9225 (1976) (Trial Exh. C-34).

tacitly or otherwise, that segregation in the schools should be preserved.

- There is no evidence that State education officials actively impeded Yonkers officials from taking steps on their own to remedy the school segregation.
- There is no evidence that State education officials communicated to anyone in Yonkers that they would purposefully "look the other way" should Yonkers decide to continue to be in violation of State desegregation policy.
- There is no evidence that State education officials adopted a policy that indicated specific approval of the manner in which Yonkers was managing the racial makeup of its schools.
- There is no evidence that, had a Yonkers citizen filed a desegregation petition under § 310 of the New York Education Law, the State would not have responded to that petition promptly and fairly. Indeed, the record supports the finding that the Commissioners of Education in most instances enforced the racial integration policy in connection with proceedings brought before them by private citizens under § 310.

United States v. City of Yonkers, 880 F. Supp. 212, 224 (S.D.N.Y. 1995).

The court therefore dismissed all claims against the state parties predicated on the Equal Protection Clause. In particular, with respect to the individual Regents and the Commissioner of Education, the court held that the claims were precluded by the Second Circuit's decision in *Arthur v. Nyquist*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978), which the court construed to mean that a State's actual or constructive knowledge of wrongdoing and the power to end segregation were insufficient to impose liability under 42 U.S.C. § 1983 (162a-166a). *United States v. City of Yonkers*, 880 F. Supp. at 234-236. The court further held that the claims as asserted against the State, the State Education Department, the Board of

Regents, and the Governor were barred by the Eleventh Amendment (154a-156a). *Id.* at 230-231.

The court then *sua sponte* suggested that the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.* ("EEOA"), might provide a basis for holding a State vicariously liable for *de jure* school segregation at the local level (170a-175a). *Id.* at 238. It "[left] to another day and any further application of the parties" the question of whether the EEOA could therefore provide an alternative basis for relief (175a). *Id.* at 240.

Thereafter, respondents moved to amend their pleadings yet again, to assert a claim under the EEOA. In a second decision dated June 14, 1995, the district court permitted the amendment but denied relief (185a-204a). *United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995). The court ruled that the allegations against the state parties under the EEOA failed to state a claim upon which relief could be granted because that statute was not intended to afford protections against racial discrimination beyond those provided by the Fourteenth Amendment (190a-191a). *Id.* at 594-595.

C.

On September 23, 1996, the Second Circuit (Kearse, Altimari, Moran, JJ.) vacated the dismissal of both the equal protection and EEOA claims (66a). *United States v. Yonkers Bd. of Educ.*, 96 F.3d 600 (2d Cir. 1996). With respect to equal protection, the court held the Regents and the Commissioner of Education responsible for perpetuation of the *de jure* segregation which had been created solely by the City and the Yonkers Board. It also held that the State itself, the State Education Department, and the Board of Regents, while immune from any liability under 42 U.S.C. § 1983 by virtue of the Eleventh

Amendment, could incur liability under the EEOA, which it held abrogated that immunity.

The court reasoned that just as the City and the Yonkers Board had been found constitutionally liable for having intentionally created segregated schools in response to community pressure they knew to be racially motivated, the Regents and the Commissioner were constitutionally liable because their omission to act had the foreseeable effect of perpetuating known segregation (93a-96a). 96 F.3d at 613-614. The court further found that the Regents' and the Commissioner's failure to act affirmatively to combat segregtion was in response to legislative pressure they knew to be racially motivated (101a-105a). *Id.* at 616-617. The Second Circuit cited several factors as dispositive of the state defendants' liability: (1) the Regents and the Commissioner knew that segregation existed in the Yonkers school district and they "knew or should have known" that the segregation in Yonkers was *de jure*; (2) they had the power to take steps to remedy the segregation; and (3) their failure to exercise their power in a way which the court believed would have been effective was due to political pressures they knew to be racially motivated (96a-97a). *Id.* at 614. The court wrote that "[e]ven if an official had no statutory duty to act, he may be [constitutionally] liable if his refusal to act was a response to pressures that were known to be racially motivated" (96a). *Id.*

In regard to the EEOA, the Second Circuit ruled that the language of 20 U.S.C. § 1703 -- that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" -- "expressly abrogat[es] the States' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA" (111a). 96 F.3d at 619. It cited no decision of this Court in support of that conclusion.

The court then disposed of the district court's concern that the EEOA could not impose "supervisory liability" on the state

parties because it was intended to be coextensive with the Fourteenth Amendment, which does not impose such liability. Agreeing with *United States v. School Dist. of Ferndale*, 577 F.2d 1339, 1347-48 (6th Cir. 1978), the court held that the EEOA imposes "supervisory liability" on States which provide financial assistance to school districts engaging in discriminatory conduct while failing to take action requiring those districts to bring the operation of their schools into compliance with the Fourteenth Amendment (112a-115a). 96 F.3d at 620-621. The matter was remanded to the district court for further proceedings.

The state defendants filed a petition for writ of certiorari of the Second Circuit's nonfinal liability decision. This Court denied the petition on June 23, 1997. *See* 521 U.S. 1104 (1997).

D.

In 1997, the district court held a third trial, this time to address whether the vestiges that it had previously found in its August 30, 1993 decision remained in the Yonkers public schools and, if so, to formulate a further remedial plan. On October 8, 1997, the district court found, without particularizing, that vestiges of segregation persisted (39a-43a). *United States v. City of Yonkers*, 984 F. Supp. 687, 690-691 (S.D.N.Y. 1997). That same day, the court also issued its remedial order, entitled "Order For Further Desegregation Relief in the Yonkers Public Schools" (hereinafter "EIP II order"). *Id.* at 713-714. The EIP II order required the implementation of educational improvement programs estimated at that time to cost $560 million over an eight-year period. Those programs included the development and implementation of revised curriculum, staff and student support services that would enable the students to meet state and national educational standards, recruitment and training to enable staff to teach a diverse student body more effectively, information-rich classrooms, an extensive network of

classroom computers, universal full-day prekindergarten, and smaller class sizes.

While the case was on remand, the City of Yonkers moved to amend its pleading to assert a cross-claim against the state defendants, and to add as defendants the Governor and the New York State Comptroller. The City sought to have the State participate in the ongoing costs for EIP I, which included the costs of operating the expanded system of magnet schools and busing, as well as in the costs for any further remedial plan ordered by the court. The district court granted the motion and subsequently denied the state defendants' motion to dismiss on grounds of the Eleventh Amendment, lack of municipal capacity to sue, and standing.

The City, in a motion supported by the NAACP and the Yonkers Board, then sought monetary relief against the state defendants to defray part of its costs incurred in the 1996-1997 school year for implementing the initial EIP I order. By order and judgment dated February 10, 1998, the district court directed the state defendants to pay the City of Yonkers 50% of the EIP I costs incurred in the 1996-1997 school year (33a). The district court found that EIP I required $55 million in operating costs in the 1996-1997 school year. On February 10, 1998, the court entered an order and judgment against the state defendants for $9.855 million, reflecting the fact that the State had already provided to Yonkers voluntary magnet school and transportation aid during that year to support the school district's desegregation efforts.[4]

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[4] For all subsequent years the district court has adopted a formula which requires the state to pay a greater proportion of the remedial costs over the next few years, but which ultimately results in a 50%/50% sharing of such costs with the City over a nine-year period. For the 1997-1998 school year, the court found EIP I expenditures of approximately $70.4 million, which resulted in a state share of about $53 million, less appropriate credits for

E.

The state defendants appealed from both the October 8, 1997 EIP II order and the February 10, 1998 state EIP I order and judgment. On June 22, 1999, the Second Circuit issued a decision (i) reversing the district court's vestiges findings and vacating the EIP II order, and (ii) affirming the order and judgment apportioning liability against the state defendants for EIP I costs. Finding that there was insufficient record support for the vestiges cited by the district court, a majority of the Second Circuit (Jacobs and McLaughlin, JJ.) initially voted to reverse the findings of vestiges and vacate the EIP II order without remand. In partial dissent, Judge Sack, while agreeing that the findings of the identified vestiges and EIP II remedy were unsustainable, voted to remand to the district court for further findings on the existing record as to the presence of any other vestiges of segregation in the Yonkers public schools.

On July 2, 1999, the NAACP petitioned the Second Circuit for rehearing or rehearing *en banc*. On November 16, 1999, the Second Circuit granted the petition and vacated its prior opinion. *United States v. Yonkers Bd. of Educ.*, 197 F.3d 41 (2d Cir. 1999). In its opinion on rehearing, the panel adhered to its earlier conclusion "that there was insufficient record support for the only vestiges found by the district court and that the [EIP II] remedy imposed by the district court was unsustainable" (5a). *Id.* at 45. The court concluded that the evidence submitted with respect to the allegedly inadequate multicultural curriculum and teaching techniques and low teacher expectations was legally insufficient to constitute vestiges (16a-23a). *Id.* at 51-54. It

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voluntary aid. For the 1998-1999 school year, the estimated EIP I costs are $84.3 million, of which the State has been required to pay approximately $55 million. The precise calculation of the State's funding responsibility for these two years is at issue in appeals currently pending in the Second Circuit.

further concluded that the analysis of the expert for the Yonkers Board showing test score disparities that correlate with "race" was legally insufficient to demonstrate the presence of residual effects of segregation (23a-25a). *Id.* at 54-55. Consequently, the court again ruled that the sweeping quality of education remedy comprising EIP II imposed by the district court exceeded its authority (25a-27a). *Id.* at 55-56.

The panel on rehearing, however, was convinced by Judge Sack's view that it was prudent to remand the case to the district court to search the record again for the presence of any other vestiges. 197 F.3d at 46. The court therefore remanded for the limited purpose of eliciting further findings on the existing record as to whether other previously unidentified vestiges of segregation persist in the Yonkers schools (31a-32a). *Id.* at 58.

With respect to the February 10, 1998 EIP I order and judgment, the court again unanimously voted to affirm the district court's 50% apportionment against the state defendants of ongoing EIP I costs (3a). 197 F.3d at 57. In so doing, the court rejected the state defendants' arguments that no continuing liability for EIP I could be imposed against them absent a finding of vestiges. The court reasoned that because the state defendants had been adjudicated joint tortfeasors and there had yet been no declaration of unitary status, the state defendants could be held responsible for paying one-half of the ongoing costs of the EIP I remedy that had previously been imposed against the City and Board, regardless of whether vestiges now exist (29a). *Id.*

The Second Circuit's decision results in a final judgment against the State to pay 50% of the EIP I costs for the 1996-1997 school year. It is now clear that the State will be required to pay, at a minimum and regardless of what happens with respect to EIP II following remand, 50% of the annual ongoing EIP I costs until there is a formal judicial declaration of unitary status. This will result in state expenditures of hundreds of

millions of dollars. Once these EIP I expenditures have been incurred and the payments made, there is substantial risk that the State will not be able to recoup such payments if the Court waits until after the proceeding on remand relating to EIP II to hear the underlying liability issue presented in this petition.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to correct the Second Circuit's misapprehension of this Court's precedents and to ensure that the Second Circuit's decisions are not used as precedent to impose novel and expansive liability on the States for the unconstitutional acts of their municipal subdivisions and local school districts. In view of the fact that the State is being required to devote hundreds of millions of dollars to the implementation of a desegregation order for a single school district of only 24,000 students, the issues presented by the Second Circuit's decisions are of vast importance to the State of New York and to States throughout the country.

The Second Circuit's liability holding is premised on the findings that state officials knew of the *de facto* segregation of the Yonkers public schools, and that they *should have known* that such segregation was illegal *de jure* segregation. The courts below did not cite or rely on any findings that state officials had actual knowledge of the manifold intentionally discriminatory acts that led those courts to impose liability against the City and Yonkers Board. The finding of liability based on the inference that state officials should have known of the *de jure* nature of the segregation directly conflicts with this Court's recent rulings that actual knowledge is a prerequisite to the imposition of supervisory liability under the Fourteenth Amendment and 42 U.S.C. § 1983.

Moreover, the courts below were without jurisdiction to require the state defendants to pay half of the ongoing costs of

the desegregation remedy previously imposed against the City and the Board, where full desegregation of the schools as measured by the *Green*[5] factors has long since been achieved and the courts have identified no vestiges of the prior segregation currently extant in the Yonkers public schools. Finally, the Second Circuit's rulings with respect to the Equal Educational Opportunities Act are in direct contravention of this Court's Eleventh Amendment jurisprudence and of the scope of liability set forth in that statute.

POINT I

THE SECOND CIRCUIT'S HOLDING THAT STATE OFFICIALS ARE LIABLE UNDER THE FOURTEENTH AMENDMENT FOR FAILING TO TAKE AFFIRMATIVE REMEDIAL STEPS TO COMBAT LOCAL SCHOOL SEGREGATION, ABSENT ANY STATE PARTICIPATION IN OR ACTUAL KNOWLEDGE OF THE LOCAL DISCRIMINATORY ACTS, DIRECTLY CONFLICTS WITH RECENT DECISIONS OF THIS COURT AND CONSTITUTES AN UNWARRANTED EXPANSION OF CIVIL RIGHTS LIABILITY.

The Second Circuit's 1996 decision holding New York State education officials liable under 42 U.S.C. § 1983 for not taking actions to eradicate the pre-1985 segregation of the Yonkers public schools is irreconcilable with the civil rights precedents of this Court. The Second Circuit upheld "constructive knowledge" as a basis for imposing supervisory liability on state officials for failing to exercise enforcement powers to correct the unconstitutional acts of municipal subdivisions. This holding directly conflicts with this Court's recent precedents holding that

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[5] *Green v. County School Board*, 391 U.S. 430 (1968).

actual knowledge, not constructive knowledge, of constitutional violations is a prerequisite to imposing supervisory liability on governmental entities for the constitutional violations caused by their employees or others under their control. It also erroneously premises liability on state officials' constructive knowledge of a *local* constitutional violation and their failure to take action to remedy illegality which was caused by legally distinct political subdivisions of the State.

This Court has held that, absent a policy or custom that directly causes a constitutional violation, a municipality can be held liable under the Fourteenth Amendment and 42 U.S.C. § 1983 for the constitutional violations of its employees only upon proof that policy-making officials deliberately disregarded constitutional consequences which were actually known or plainly obvious. *See Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 398 (1997). Subsequently, in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), this Court, employing this same "deliberate indifference" standard, expressly ruled that constructive knowledge is not enough to establish liability against recipients of federal funds in a suit alleging teacher-on-student harassment. *See also Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (holding under same standard that school district could be held liable under Title IX for student-on-student harassment only if school officials had actual knowledge of misconduct and deliberately chose to remain indifferent to it). The Court has insisted on this more stringent "actual knowledge" standard to ensure that liability is placed on an entity only where its own culpability is the "moving force" behind the constitutional violation. Without such a rigorous standard, the Court explained, municipal liability "collapses into *respondeat superior* liability," and raises "serious federalism concerns." *Board of Commissioners of Bryan County v. Brown*, 520 U.S. at 415.

The Second Circuit held that state officials could be held liable based on constructive, as opposed to actual, knowledge that the segregation in the Yonkers public schools was *de jure*. It concluded:

> In sum, the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, causes and extent of the segregation in the Yonkers public schools, and that they knew *or should have known* that the school segregation in Yonkers was *de jure*.

(102a) (emphasis added). The court recounted evidence showing that state officials were aware of the numerical racial imbalances of students in the Yonkers public schools; the testimony of a "Specialist in Educational Integration" employed by the State Education Department ("SED") that the predominantly minority schools tended to have worse physical plants and more minority teachers than those predominantly attended predominantly by nonminorities; and evidence that top state educational officials knew that there would be significant race-based opposition to desegregation in the community. None of this evidence demonstrated -- nor did the court conclude that it demonstrated -- that anyone at SED, let alone the Commissioner or any of the Regents, had actual knowledge that the cause of the segregation of the Yonkers schools was the intentionally discriminatory actions over a 45-year period by local municipal and school board officials.

Nor did any of this evidence show that it was plainly obvious to the Commissioner or the Regents that the segregation was *de jure*. Remarkably, neither the district court nor the Second Circuit examined state officials' knowledge of the individual housing and school-related decisions by local and school board

officials over four decades, which those courts found to be the intentional acts of segregation forming the basis of liability of the City of Yonkers and the Yonkers Board of Education. Neither court made any findings, nor could they have, that this complex history of local decisions made it plainly obvious to the Commissioner or the Regents that the segregation was intentionally caused by City and Board officials.

Holding state officials liable based solely on constructive knowledge, as opposed to actual knowledge, vitiates any confidence that the constitutional injury resulted from their own culpable conduct. This is particularly of concern because a State and its local school districts and municipalities are legally discrete governmental units which have distinct responsibilities under state law, a circumstance well recognized in this Court's decisions holding that States are entitled to Eleventh Amendment immunity while municipalities and local school districts are not. *See Will v. Michigan Police Dep't*, 491 U.S. 58, 70 (1989); *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 690, n.54 (1978). Indeed, the Second Circuit undertook no analysis of the respective state and local roles which exist as a matter of state law. Given this, and in view of the multitude of decisionmakers at the state level, both programmatic and budgetary, the Second Circuit's imposition of liability on state officials based on a *less* demanding standard than that applied to municipalities and school districts with respect to actions of their employees, is especially novel and troublesome.

The Second Circuit's holding is in tension with *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Reid v. Kayye*, 885 F.2d 129 (4th Cir. 1989). There, the Fourth and Fifth Circuits rejected the claimed "supervisory liability" of state officials to redress unconstitutional conditions at the local level, notwithstanding state law requiring the state agencies to issue standards which they had the authority to enforce, because state law placed the responsibility for operating the county jails on the

county rather than with the state agencies. *Bush*, 795 F.2d at 1206; *Reid*, 885 F.2d at 132. As explained in *Bush*, "[T]he effort by Texas to improve conditions at its 254 county jails is not subject to federal superintendence." 795 F.2d at 1204. Further, "[t]he enforcement of state law is the job of the states, and the federal civil rights statute may not be used to bootstrap alleged violations of state law into federal claims." 795 F.2d at 1209. Compare *Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981) (holding the Ohio State Board of Education and Superintendent of Public Instruction liable for local segregation based primarily on the affirmative act of providing funding to the locality in the face of their specific statutory duty to withhold funding under the circumstances); and *Penick v. Columbus Bd. of Educ.*, 663 F.2d 24 (6th Cir. 1981) (same), *cert. denied*, 455 U.S. 1018 (1982).

This Court has never addressed the circumstances under which state officials may be held liable for not taking action to correct *de jure* school segregation caused by local entities, where the state had no affirmative complicity in causing such segregation. In the case bearing closest resemblance the circumstances of this case, *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Milliken v. Bradley*, 418 U.S. 717 (1974), Michigan did not challenge the lower courts' finding of liability, as this Court expressly noted. *See* 433 U.S. at 289. The question is now squarely presented in this case. Certiorari is warranted on this basis alone.

POINT II

IN THE ABSENCE OF VESTIGES THERE IS NO JURISDICTIONAL BASIS FOR IMPOSING ANY LIABILITY ON THE STATE OR ITS OFFICIALS FOR THE COSTS OF EIP I.

The Fourteenth Amendment charges governmental officials who have caused segregated school systems "with an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-438 (1968). Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment. *See Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979). Without a finding of current segregation or vestiges, however, there can be no basis for a federal court to exercise its remedial authority.

Here, there is no judicial finding that any segregation or vestiges of segregation remain in the Yonkers public schools. The district court imposed EIP I on May 13, 1986. In its 1993 decision, the district court opened with the praise, "[a]s a result of good faith and zealous implementation by the Yonkers Board of Education * * * and its staff of [EIP I], the racial separation of students in the Yonkers public schools, which had existed for decades, ended. * * * Within less than a year of the issuance of EIP I, the Yonkers Board achieved desegregation of enrollments among the schools." (207a-208a [internal quotations omitted]). As the Second Circuit observed in its November 16, 1999 decision, "[i]t is undisputed that the Yonkers School Board has achieved full integration as measured by the *Green* factors." (15a, *citing Green v. County School Board*, 391 U.S. 430, 435). Moreover, the Second Circuit went on to hold that the district court had not identified any legally sufficient vestiges of the prior segregation.

The district court correctly observed long ago in this case that, "if no vestiges exist, this litigation against the State will, of course, be dismissed" (211a). *United States v. City of Yonkers*, unreported (S.D.N.Y. July 10, 1992), *quoted in* 833 F. Supp. 214, 217 (S.D.N.Y. 1993). This is because, absent vestiges, there is no current violation of the Fourteenth Amendment and thus state officials acting in their official capacity cannot be ordered to participate in any prospective injunctive relief. Accordingly, the Second Circuit erred in ordering the State to pay for half of the continuing costs of EIP I for the 1996-1997 school year.[6]

The fact that the courts have not formally entered a declaration that the Yonkers school system is unitary is immaterial. A declaration of unitary status occurs upon findings not only that vestiges have been eliminated to the extent practicable, but also that there has been complete compliance with the remedial decree and that the school district has

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[6] Claims against the State defendants for the costs of EIP I asserted by the City and the Yonkers Board are barred for the additional reason that they are claims under New York law for contribution, which are barred by the Eleventh Amendment and by principles of municipal incapacity to sue the sovereign and standing. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) (Eleventh Amendment bars ancillary claims for indemnification); *City of Trenton v. New Jersey*, 262 U.S. 182, 189-190 (1923) (municipality lacks capacity to sue State); *see Dekalb County School Dist. v. Schrenko*, 109 F.3d 680, 689 (11th Cir.), *cert. denied*, 522 U.S. 1015 (1997) (rejecting school district's cross-claim against State for costs of desegregation remedy on grounds of federalism and comity); *Stanley v. Darlington County School Dist.*, 84 F.3d 707, 716 (4th Cir. 1996) (same); *Kelley v. Metropolitan County Board of Education of Nashville & Davidson County*, 836 F.2d 986, 995-998 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) (rejecting school district's cross-claim against the State for financial participation in previously imposed desegregation remedy on grounds of municipal incapacity, state sovereignty, and federalism). Such state law claims cannot serve as a basis for the federal courts to impose liability against the State for a desegregation remedy previously imposed against the municipal defendants.

demonstrated a good-faith commitment to continued compliance with the decree. *See Missouri v. Jenkins*, 515 U.S. 70, 89 (1995), citing *Dowell v. Board of Educ.*, 498 U.S. 237, 249-250 (1991). Factors relating to whether the City and Board have in good faith complied with the prior remedial decree are not relevant to whether the elements of a cause of action against state officials now exist. Given the alignment of the parties in this case, with the City and Board having a substantial disincentive to seeking a formal declaration of unitary status, any theoretical relevance of the fact that there has yet been no formal declaration of unitary status is completely dissipated.

POINT III

THE SECOND CIRCUIT'S HOLDING THAT THE STATE INSTITUTIONAL DEFENDANTS MAY BE HELD LIABLE UNDER THE EEOA FOR FAILING TO REMEDIATE DISCRIMINATION CAUSED BY LOCAL EDUCATIONAL AGENCIES CONFLICTS WITH THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE AND A FIFTH CIRCUIT COURT DECISION CONSTRUING THE SCOPE OF EEOA LIABILITY.

Should petitioners prevail on their argument that individual state officials cannot be held liable under the Fourteenth Amendment and 42 U.S.C. § 1983, the correctness of the Second Circuit's holding that the state institutional defendants are alternatively liable under the Equal Educational Opportunities Act, 20 U.S.C. §§ 1701-1758 ("EEOA" or "Act") becomes relevant. The court's holding that the EEOA abrogates the States' Eleventh Amendment immunity is in direct conflict with this Court's decisions. Moreover, the Second Circuit's conclusion that the EEOA imposes upon state educational agencies supervisory responsibility and liability which is broader than that which exists against state officials under the Fourteenth

Amendment is erroneous, directly conflicts with a Fifth Circuit decision, and results in the imposition of novel and expansive liability against States.

A. The Second Circuit's Holding That the Equal Educational Opportunities Act Abrogates the States' Eleventh Amendment Immunity Conflicts with this Court's Decisions.

The Second Circuit's holding that the EEOA abrogates the States' Eleventh Amendment immunity is in conflict with this Court's controlling precedents. This Court has consistently held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, __ U.S. __, 120 S. Ct. 631, 2000 WL 14165 (Jan. 11, 2000) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Put another way, this Court demands that the congressional intent to abrogate be manifest in "unequivocal statutory language." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 246); *see also Dellmuth v. Muth*, 491 U.S. at 230 ("evidence of congressional intent [to abrogate] must be both unequivocal and textual").

The Court has made clear that a statute's mere reference to, and imposition of obligations on, the State cannot substitute for the requisite unequivocal declaration that Congress is exercising its power to abrogate. *Dellmuth v. Muth*, 491 U.S. at 232. Similarly, "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 246; *accord Dellmuth v. Muth*, 491 U.S. at 231; *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 476 (1987); *Blatchford v. Native Village of*

Noatak, 501 U.S. 775, 787 n.4 (1991) ("[t]he fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim").

In its 1996 state liability decision, the Second Circuit grounded its holding of abrogation *solely* on the EEOA's apparent imposition of obligations on the State and state educational agencies to ensure compliance with the Act (46a) ("[t]he Act ... in providing explicitly that '[n]o State' shall engage in the prohibited conduct and in including within the prohibition acts by 'State educational agenc[ies],' obviously reflects Congress's intention to hold the States and their agencies liable"). Notably, the Second Circuit did not cite any decision of this Court in its ruling on this issue.

The impermissibility of the Second Circuit's inference of abrogation on this solitary basis is plain under this Court's decision in *Dellmuth*. There, the respondent contended that the Education of the Handicapped Act's frequent reference to the States and delineation of the States' role in providing proper education for handicapped children evinced a congressional intent to abrogate the States' immunity. 491 U.S. at 232. This Court disagreed, stating:

> This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation. *Id.*

The Second Circuit's conclusion in the instant case simply cannot be harmonized with *Dellmuth*.

The fact that the Seventh and Ninth Circuits have also found the EEOA to abrogate the Eleventh Amendment on identically flawed grounds only underscores why certiorari is warranted in this case. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). In both cases -- decided before *Dellmuth* and this Court's more recent pronouncements on the issue -- the courts relied only on the apparent obligations imposed on the States and the general authorization for suit in federal court as evincing a congressional intent to abrogate. *See Gomez v. Illinois State Bd. of Educ.*, 811 F.2d at 1037-1038; *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d at 946. Subsequent decisions of this Court, particularly *Dellmuth*, confirm that these holdings are erroneous.

Thus, the law of three circuits on this issue is currently in conflict with the controlling decisions of this Court. In the instant case, the EEOA is being employed to impose vast, prospective liability on New York State and its educational entities, and will undoubtedly be wielded in a similar fashion in other States. *See, e.g., Flores v. Arizona*, 48 F. Supp. 2d 937 (D. Ariz. 1999). (Eleventh Amendment no bar to suit against State under EEOA for failing to provide limited English speaking children with proper instruction). Accordingly, the Second Circuit's erroneous conclusion that the State's immunity is abrogated under the EEOA merits consideration by this Court.

B. The Second Circuit Improperly Construed the EEOA to Impose Supervisory Responsibility on the States to Enforce Local Educational Agencies' Compliance with Federal Equal Protection Principles and Is in Conflict with the Fifth Circuit.

Even if Congress intended in the EEOA to make the States answerable in federal court for their own intentional discriminatory conduct, a proper reading of the statute does not reveal a congressional intent to enlarge state liability beyond that which exists under the Fourteenth Amendment. The Second Circuit's interpretation of the Act as imposing a broader supervisory obligation upon the States to enforce local desegregation is in conflict with *United States v. Texas*, 680 F.2d 356, 373 (5th Cir. 1982).

The Second Circuit construed the EEOA as "impos[ing] on states the obligation to enforce the equal-educational opportunity obligations of local educational agencies," (112a-113a, citing *Idaho Migrant Council v. Board of Education*, 647 F.2d 69, 71 (9th Cir. 1981), and *United States v. School District of Ferndale*, 577 F.2d 1339, 1347 (6th Cir. 1978)). The court wrote that it agreed with the Sixth Circuit's view in *Ferndale* that a proper EEOA claim is stated by the allegations that the State tolerated and provided assistance to local school districts which it knew to be engaging in the discriminatory assignment of students and teachers. The Second Circuit went on to write that the district court in the present case "correctly stated that 'the literal and unambiguous language of section 1703 ... seems to impose on states ... supervisory liability,'" and suggested that the district court was also correct in stating that "if one were to set about to write a statute in a way that provided for vicarious state liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA" (114a-115a).

The Second Circuit's interpretation is in conflict with the Fifth Circuit's ruling that § 1703(b) is coextensive with the Fourteenth and Fifth Amendments, prohibiting only purposeful discrimination by state actors. *See United States v. Texas*, 680 F.2d 356, 371, 373 (5th Cir. 1982). The Second Circuit did not address *United States v. Texas* in its decision. Instead, it cited a prior Fifth Circuit decision, *United States v. Hinds County School Bd.*, 560 F.2d 619, 623 (5th Cir. 1977), that is distinguished in *Texas* as not applying to § 1703(b).

In *United States v. Texas*, the Fifth Circuit reversed an order of the district court which required that Texas provide bilingual instruction to all Mexican-American children of limited English proficiency in Texas public schools, based in part on its interpretation of the EEOA, 20 U.S.C. §§ 1703(b) and (f). Among its many findings, the district court concluded that the State as a whole had discriminated against Mexican-American students and that such discrimination constituted a breach of § 1703(b). The Fifth Circuit discussed the findings of the district court and concluded that there was insufficient evidence in the record "to prove that the State as a whole has in the past discriminated against Mexican-American students." 680 F.2d at 371. It thus held that the district court's conclusions that there were constitutional violations by the State could not stand. *Id.* at 371. The court then held that the § 1703(b) claims fell for the same reasons that the constitutional claims failed. Liability premised on § 1703(b), the court held, "requires proof of action taken with invidious intent." *Id.* at 373.

Examination of the EEOA and its history discloses that the Second Circuit's construction of 20 U.S.C. § 1703(b) is erroneous. The purpose of the EEOA is "to specify appropriate remedies for the orderly removal of the vestiges of the dual school system." 20 U.S.C. § 1701(b). Virtually the entire statute is devoted to limiting the ways in which federal courts may proceed in remedying unlawful discrimination and to identifying

and emphasizing those actions and conditions that *do not* constitute denials of equal educational opportunity. In fact, the only sections of the EEOA that do not specifically limit the availability of aggressive desegregation methods or set forth situations that do not create a need for desegregation are those provisions relating to jurisdiction, standing to bring suit and § 1703. Accordingly, § 1703(b) does not place additional supervisory obligations on state educational agencies.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
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Respectfully submitted,

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